his reputation, acquired at great expense of money and effort, from being used as a weapon against him. The partial appropriation of this reputation by the cut price retailer for the purpose of discrediting the particular brand of goods, destroying the general market for them and attracting people into the cut price store to enable the proprietor to foist off other brands is a trading upon the name and reputation of the manufacturer in a way not equitable,[5] being neither authorized by the manufacturer nor paid for in the purchase price of the goods. M. K. W.

CONTRACTS: REPUDIATION: SALE BY VENDOR TO THIRD PARTY.—Repudiation has been defined to be "such words or actions by a contracting party as indicate that he is not going to perform his contract in the future;"[1] as, for example, by saying he is not going to perform. An unequivocal repudiating act should equally be considered a breach as, for example, where the vendor in a contract to sell land to A conveys to B, an innocent purchaser, and under no duty to convey to A. A should not be required to hold himself in readiness to perform and wait to see whether B will choose to carry out the vendor's contract. The California law has been assumed to be otherwise,[2] but Mr. Justice Henshaw, in *Brimmer v. Salisbury,*[3] in a careful review of the authorities points out that in such cases as Joyce v. Shafer[4] there was no showing that the vendor was conveying in disregard of the first purchaser's rights; for all that appeared he may have been selling in strict subordination to the first purchaser's equitable title. The California law is thus shown to be in accord with authority and sound principle. A. M. K.

CONTRIBUTORY NEGLIGENCE: STORING COMBUSTIBLE MATERIAL ON PLAINTIFF'S LAND ADJOINING RAILROAD RIGHT OF WAY.—The partially concurring opinion of Justice Holmes, with whom Chief Justice White agreed, in the case of *Leroy Fibre Company* v. *Chicago, M. & S. P. Ry.,*[1] raises the question whether a man may be guilty of contributory negligence on account of the location, or material, or contents of a structure which he has erected on his own land, but adjoining, or close to, a line of railroad. The minds of Justice McKenna, who writes the opinion of the court, and Jus-

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[5] For a clear description of the methods of illegitimate price cutters, and a discussion of the producer's equitable rights, see Predatory Price Cutting as Unfair Trade, 27 Harv. Law Rev. 139.

[1] Wald's Pollock on Contracts, 3d ed. by Williston, p. 333.

[2] Joyce v. Shafer, (1893) 97 Cal. 335, 32 Pac. 320; Shiveley v. Semitropic etc. Co., (1893) 99 Cal. 259, 33 Pac. 848; Garberino v. Roberts, (1895) 109 Cal. 125, 41 Pac. 857; Wald's Pollock on Contracts, 3d ed. by Williston, p. 354.

[3] (Mar. 27, 1914) 47 Cal. Dec. 469.

[4] (1893) 97 Cal. 335, 32 Pac. 320.

[1] (Feb 24, 1914) 232 U. S. 340, 34 Sup. Ct. Rep. 415.

tice Holmes do not meet at all in their arguments. The basis of Justice McKenna's argument is that "the rights of one man in the use of his property cannot be limited by the wrongs of another." He holds, accordingly, on what he regards as authority, that the plaintiff cannot, as a matter of law, be precluded from recovery on the ground of his contributory negligence. The vice of this argument on principle is that the case does not present a conflict of rights and wrongs, but a conflict of relative rights. "The question as to the property owner's contributory negiligence or want of due care before the fire must have reference to his right to use his own property with due regard to the right of the railroad company also to so use its own as not to injure another."[2] The vice of the argument on authority, is that the authorities are not apposite. Justice Holmes, on the other hand, says: "If a man stacked his flax so near to a railroad that it obviously was likely to be set fire to by a well-managed train, I should say that he could not throw the loss upon the railroad by the oscillating result of an inquiry by the jury whether the road had used due care. I should say that, although of course he had a right to put his flax where he liked upon his own land, the liability of the railroad for a fire was absolutely conditioned upon the stacks being at a reasonably safe distance from the train."

Justice Holmes appeals to no cases. Justice McKenna relies upon two, one in the United States Supreme Court,[3] and one in a Federal Circuit Court.[4] In both of these cases the plaintiff's property, for whose destruction through the default of the defendant damages were sought had been placed by license from the defendant on the defendant's roadway. In the former case a statute of Vermont made a railroad corporation liable for all damage resulting from fire originating from its engines, unless the corporation was able to show that there was no fault on its part. The question in the case was whether the plaintiff's building, being on the defendant's roadway, came within the terms of the statute. In the second case the dictum of Circuit Judge Lurton relied on is not, we submit, correctly interpreted. The quotation from Circuit Judge Lurton is: "But in so far as the opinions go upon the theory that a plaintiff must lose his right of compensation for the negligent destruction of his own property, situated upon his own premises, because he had exposed it to dangers which could come to it *only through the negligence of the railroad company,* they do not meet our approval." As thus stated, they would not meet anybody's approval. That was not the question in the principal case. Of course, the plaintiff is not bound to anticipate the defendant's negligent conduct. The question is shall he be precluded from recovery

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[2] Wabash R. R. v Miller, (1897) 18 Ind. App. 549, 48 N. E. 663.
[3] Grand Trunk R. R. v. Richardson, (1875) 91 U. S. 454.
[4] Cincinnati, N. O. & T. R. R. v. South Fork Coal Co., (1905) 139 Fed. 528.

on account of contributory negligence if he has not guarded against the defendant's non-negligent conduct of his business.

Justice McKenna refers, again, generally, for other cases, to Thompson on Negligence,[5] and to Shearman & Redfield on Negligence.[6] None of the cases cited by these authors bears out the construction put upon them. Shearman & Redfield's discussion and citation of cases in notes unfortunately leave one in doubt, but a perusal of the cases shows that they go, almost uniformly, only to holding that one is not precluded from recovery, as a matter of law, merely because he placed his combustible goods near a railway track. In such case it is for the jury to determine whether there was contributory negligence.[7]

Some confusion has resulted from not discriminating[8] between three classes of cases in which the question of the effect of the plaintiff's contributory negligence has arisen, namely, (1) where the liability of the defendant rests upon the common law; (2) where the liability of the railroad company for fire set out by its locomotive is made absolute by statute; and (3) where such liability is limited by the statute itself. In the first class of cases, contributory negligence is a defence; in the second, the liability of the company is absolute, and the contributory negligence of the plaintiff is not a defence. In the third class, the question of contributory negligence and its effect depends on the terms of the statute.[9]

If Justice Holmes had discussed the authorities, we do not believe that the court could have failed to follow him.[10] But it is a splendid thing to have a Justice on the Supreme Bench who can speak the following sentences, even though they go above the heads of his associates: "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. See Nash v. United States, 229 U. S. 373, 376, 377. Negligence is all degree,—that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist, and the simple

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[5] Sec. 2314.

[6] Sec. 680.

[7] Alabama & V. Ry. v Sol Fried Co., (1902) 81 Miss. 314, 33 So. 74.

[8] Such lack of discrimination is manifested in Shearman & Redfield on Negligence, sec. 680, n. 120.

[9] Peter v. Chicago & West Michigan Ry., (1899) 121 Mich. 324, 80 N. W. 295.

[10] For example: Fero v. Buffalo, etc. Ry., (1860) 22 N. Y. 209; Kalbfleisch v. Long Island R. R., (1886) 102 N. Y. 520, 7 N. E. 557; Missouri Pacific Ry. v. Kincaid, (1883) 29 Kan. 467; Boston Excelsior Co. v. Bangor & Aroostock R. R, (1899) 93 Me. 52, 44 Atl. 138; Cleveland, C. C. & St. L. Ry. v. Scantland, (1898) 151 Ind. 488, 51 N. E. 1068; St. Louis & S. W. Ry v. Miller, (1901) 27 Tex. App. 344, 66 S. W. 139; Texas & P. Ry. v. Rutherford, (1902) 28 Tex. App. 590, 68 S. W. 825; Southern Ry v. Patterson, (1906) 105 Va. 6, 52 S. E. 694; Chicago, B. & O. Ry. v. Cook, (1909) 18 Wyo. 43. 102 Pac. 657.

universality of the rules in the Twelve Tables, or the Leges Barbarorum, there lies the culture of two thousand years."

W. C. J.

CRIMINAL LAW: DUTY OF FATHER TO SUPPORT HIS CHILD ALTHOUGH OTHERS CARE FOR IT.—In the prosecution of a father for failure to support his minor children, the Utah court in *State v. Bess*[1] held that it was no defense that the wants of the children were supplied by the charity of third persons. The holding is in accord with Hunter v. State[2] and the weight of authority and contrary to the contention of counsel, considered but not made the basis of the decision, by the California District Court of Appeal in People v. Hartman.[3]

C. S. J.

CRIMINAL LAW: PHYSICIANS: NEGLIGENCE.—Where a physician is indicted for "criminal negligence and ignorance" in treating a patient, it has long been a controverted question whether he is to be judged by the external standard of professional skill in the community[1] or by the internal standard of his own state of mind, so that actual good intent and expectation of good results is an absolute justification.[2] The case of *State v. Smith*[3] sets up a third standard based on the skill possessed by practitioners of the school of healing to which the defendant belongs. It was accordingly held error to admit the opinions of allopaths on the trial of an osteopath. Healers by unorthodox methods must therefore form a school in order to take advantage of a defense based upon their own methods. This seems to be the effect also of the statute in California licensing healers as physicians and surgeons or as drugless practitioners.[4]

The result seems fair; it recognizes that methods of treatment change and theories differ. The law does enough in general if it prevents deception by compelling each practitioner to indicate the school to which he belongs. It is said in the principal case, "These are times of advanced science and liberal thought when every person may think and act for himself. Every community has its multitude of beliefs and modes of treatment of diseases and human ailments, and every citizen is absolutely free to adopt, believe, or employ any one he pleases." If the legislature believes the public is in danger by this freedom, it may require, as it has done, certain studies as prerequisite for a license, or may forbid or prescribe certain methods of treatment.

A. M. K.

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[1] (Dec. 22, 1913) 137 Pac. 289 (Utah).
[2] (1913) 134 Pac. 1134. (Okl.)
[3] (1913) 17 Cal. App. Dec. 419, 137 Pac. 611; 2 Cal. Law Rev. 145.
[1] Commonwealth v. Pierce, (1884) 138 Mass. 165.
[2] State v. Schulz, (1881) 55 Ia. 698, 39 Am. Rep. 187.
[3] (Feb. 7, 1914) 138 Pac. (Idaho) 1107.
[4] Cal. Statutes, 1913, p. 722.